No. 88-261

In The

Supreme Court of the United States

October Term, 1987

MARILYN ARONS,

Petitioner,

v.

NEW JERSEY STATE BOARD OF EDUCATION, et al.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a state which accepts federal funding under the Education for All Handicapped Children Act and pursuant thereto agrees to accord a right to parents of handicapped children "to be accompanied and advised" in State administrative hearings "by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children . . . " compelled thereby to waive mandatory rules adopted by its Supreme Court governing non-lawyer representation or assistance in State administrative proceedings, including the prohibition of compensation of the non-lawyer for such services?

2. May a state, consistent with the dictates of the equal protection clause of the Fourteenth Amendment and in the absence of any federal statutory funding requirements, prescribe the conditions under which non-attorneys may represent or assist parties in State administrative hearings, including the waiver of fees for such representation or assistance?

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COUNTERSTATEMENT OF THE CASE

As a condition of its receipt of federal funding provided under the Education for all Handicapped Children Act, the State of New Jersey is required to comply with an extensive set of goals and procedures to ensure that all handicapped children have access to a free public education, 20 *U.S.C.* § 1400(c); *Bd. of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 *U.S.* 176, 179, 192, 200 (1982), including the establishment of procedural safeguards to protect the rights of handicapped children, parents and guardians (20 *U.S.C.* §§ 1412(5), 1415). Pursuant to this federal statutory scheme, whenever a parent

or guardian of a handicapped child presents a complaint with respect to "any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to such child . . . " (20 *U.S.C.* § 1415(b)(1)(E)), the parents or guardian must be afforded: the opportunity for an impartial "due process hearing" (20 *U.S.C.* § 1415(b)(2)); "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children . . . " (20 *U.S.C.* § 1415(d)(1)); the right to present evidence and cross-examine witnesses; and the right to receive written findings of facts and decisions (20 *U.S.C.* § 1415(d)(2) to (4)). Through the State Plans submitted to the federal government and through regulations promulgated by the State Board of Education, New Jersey has adopted policies and procedures to meet the standards of the Education for all Handicapped Children Act, including the opportunity for a due process hearing conducted before the State's Office of Administrative Law ("OAL") (see *N.J.S.A.* 52:14F-1 *et seq.*).

* * *

In 1983 the Supreme Court of New Jersey, which regulates the practice of law within the State, responded to recommendations of its Committee on Civil Practice (Aa65 to Aa76) and amended its Court Rules to permit the appearance of non-attorneys under certain defined circumstances in hearings before the OAL "[s]ubject to such limitations and procedural rules" promulgated by

that agency.* In authorizing these appearances the Court emphasized however that such representation or assistance could not be undertaken "by any person who receives any fee for such representation." *N.J. Ct. R.* 1:21-1(e). Included among the permissible lay appearances were those "required by federal statute or regulation." *N.J. Ct. R.* 1:21-1(e)(1).

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* *N.J. Ct. R.* 1:21-1(e), as amended, provides in its entirety:

(e) Appearances Before Office of Administrative Law. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law may be permitted, on application, in any of the following circumstances:

(1) where required by federal statute or regulation;

(2) to represent a state agency if the Attorney General does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy.

(3) to represent a county welfare agency if County Counsel does not provide representation in the particular matter and the non-attorney representative is an employee of the agency with special expertise or experience in the matter in controversy;

(4) to assist in providing representation to an indigent as part of a Legal Services program if the non-attorney is a paralegal or legal assistant employed by that program;

(Continued on following page)

Thereafter the Office of Administrative Law adopted regulations implementing all but one provision of *N.J. Ct. R.* 1:21-1(e) (namely, *N.J. Ct. R.* 1:21-1(e)(7), permitting lay representatives, not associated with a Legal Services agency, to assist indigent citizens). *See N.J.A.C.* 1:1-5.4. Specific provisions were also adopted permitting "non-lawyer representation" in special education hearings consistent with "Federal and State requirements." *N.J.A.C.*

(Continued from previous page)

(5) to represent a state, county or local government employee in Civil Service proceedings, provided (i) the non-attorney making such appearance is an authorized representative of a labor organization and (ii) the labor organization is the duly authorized representative of the employee for collective bargaining purposes;

(6) to represent a close corporation provided the non-attorney is a principal of the corporation;

(7) to assist an individual who is not represented by an attorney provided (i) the presentation appears likely to be enhanced by such assistance, (ii) the individual certifies that he lacks the means to retain an attorney and that representation is not available through a Legal Services program and (iii) the conduct of the proceeding by the Office of Administrative Law will not be impaired by such assistance.

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney nor by any person who receives any fee for such representation.

1:1-5.4(b)(2)(iv); *N.J.A.C.* 1:6A-4.2.* As required by *N.J. Ct. R.* 1:21-1(e), OAL conditioned any non-lawyer's appearance upon express waiver of a claim for compensation. *N.J.A.C.* 1:1-5.4(b)(2)(vi).

Pursuant to the above rules petitioner Marilyn Arons, a professional educator,** obtained approval from OAL to assist parents in special education due process hearings at that forum. With the apparent acquiescence of individual Administrative Law Judges, Ms. Arons has been permitted to present and cross-examine witnesses

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* *N.J.A.C.* 1:1-5.4(b)(2)(iv) requires that

> [i]n special education hearings the non-lawyer applicant shall include in his or her Notice [of Appearance/ Application] an explanation of how he or she satisfies the Federal and State requirements for non-lawyer representation.

N.J.A.C. 1:6A-4.2, titled "Representation," provides:

> (a) At a hearing any party may be accompanied and advised by legal counsel or by individuals with special knowledge or training with respect to handicapped pupils and their education needs, or both;
>
> (b) A non-lawyer seeking to represent a party shall comply with the application process contained in *N.J.A.C.* 1:1-5.4 and shall be bound by the approval practices, limitations and practice requirements contained in *N.J.A.C.* 1:1-5.5.

** Ms. Arons has not been formally educated as a lawyer and is not admitted to the New Jersey bar (Aa6).

and to file legal briefs in these administrative hearings (App. 21a).*

Although Ms. Arons asserted repeatedly below that she was the "sole source of immediate and direct legal aid to parents" of handicapped children (Aa12) and the only "free or low-cost legal service in the State of New Jersey in the area of special education law." (Certification of Marilyn Arons at ¶ 39, attached to initial complaint), the trial court found plaintiff's allegations to be without factual support. See App. 21a to 22a. Thus, uncontroverted OAL records established that a substantial number of parents were represented without cost by the State Public Advocate's Division of Advocacy for the Developmentally Disabled, see *N.J.S.A.* 52:27E-41.1 *et seq.*, and/or a legal services office.** *Ibid.* Additionally, these

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* While this practice has been condoned by certain Administrative Law Judges, it has not been reviewed by the Supreme Court of New Jersey. That evaluation however may be required as a result of the ruling below (App. 7a) interpreting 20 *U.S.C.* § 1415(d)(1) as "not authoriz[ing] [lay advocates] to render legal services."

** During the period from September 3, 1982 through August 11, 1986, three attorneys from the Community Health Law Project represented parents in six OAL proceedings; parents in thirty-one additional cases in this same time period were represented by eight attorneys from the Public Advocate's office. These totals, of course, do not include additional assistance provided parents by the agencies' attorneys and professional staff in dissemination of information and in negotiating settlements at pre-OAL hearing stages. (See Affidavit of Sarah Mitchell at ¶¶ 3 to 6, Aa94 to Aa97.)

records revealed that several attorneys in private practice within the State of New Jersey had handled a significant number of special education cases on behalf of parents of handicapped children. See Affidavit of Ronald Parker at ¶s 5-7, 10 (Aa78 to Aa80). In total, over 200 private attorneys have appeared in special education hearings at OAL. See Exhibit A to Affidavit of Ronald Parker.*

In January 1985 petitioner filed a complaint *pro se*, in the Federal District Court for the District of New Jersey alleging "educational malpractice" by defendants, the New Jersey State Board of Education, the New Jersey Department of Education, the New Jersey Office of Administrative Law as well as high level officials of those

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* Parents have also appeared *pro se* at OAL hearings, see Affidavit of Ronald Parker at ¶ 11 and Exhibit M, achieving in certain cases some significant measure of success. To assist these parents (as well as those who appear with lay advocates) administrative law judges are required to apply OAL procedural rules so as not to impose excessive burdens with formal requirements, particularly, "relaxed for their benefit." *N.J.A.C.* 1:1-1.13. Furthermore, in conjunction with the Department of Education, OAL has made available to parents a videotape in which a simulation of a special education due process hearing is presented and discussed, see Affidavit of Nadia Delonas at ¶ 7 (Aa87); Affidavit of Ronald Parker at ¶ 14 (Aa81 to Aa82), and a manual outlining the format of due process hearings at OAL and providing specific information as to special education law. See Affidavit of Ronald Parker at ¶ 16 (Aa83). Further training and information for parents is made available by the Department of Education, OAL and the Public Advocate through statewide conferences, workshops, publications, mailing lists, and technical assistance provided by special education consultants. See Affidavit of Nadia Delonas at ¶s 12-15 (Aa89 to Aa92); Affidavit of Ronald Parker at ¶ 16 (Aa83); Affidavit of Sarah Mitchell (Aa93 to Aa97).

agencies, in implementing the State's program for special education of handicapped children (App. 2a, 19a n.). Predicting her suit upon the authority of 42 *U.S.C.* § 1983, Arons sought an order directing a forum other than the Office of Administrative Law to decide special education cases, suspension of the operation of the State's laws on special education until compliance could be determined by a federal monitoring team, and the placement in escrow of all federal funds for educational programs in New Jersey. In addition, monetary awards were requested for the purposes of training lay advocates, defraying legal fees and costs of administrative proceedings, providing subsidies to each classified handicapped child at age 18 and funding a parent/professional newsletter (Aa10 to Aa11). In response to the State's filing of a motion to dismiss the complaint for lack of standing and the failure to allege any valid cause of action as to which relief could be granted, petitioner later amended her complaint to allege that she suffered economic and other injury by reason of the State's actions, including the ability to obtain compensation for her services at OAL hearings (App. 19a n.). By Order and Opinion dated November 5, 1985, the Honorable H. Lee Sarokin, U.S.D.J., granted in substantial part defendants' motion to dismiss (*Ibid.*).

On October 16, 1986 and December 1, 1986, defendants moved pursuant to *Fed. R. Civ. Proc.* 12(b)(i) and 56(d) for an Order dismissing the claims which survived the initial motion to dismiss:

(1) claims for relief based upon the individual defendants' alleged wrongful publication of plaintiff's name, libelous statements and denial of funding to Arons;

(2) claims against all defendants as to the issue of Arons' entitlement to compensation under federal statutory and constitutional law for her lay advocacy work in special education hearings before the Office of Administrative Law. [App. 18a to 19a]

On April 27, 1987, Judge Sarokin issued a written opinion and order granting defendants' motions (App. 14a to 37a).

As to the compensation claim, the sole issue ultimately appealed, Judge Sarokin noted the absence of any language in the Education Act for all Handicapped Children itself imposing any requirement on the State or creating any rights in parents of handicapped children or lay advocates for compensation for these services (App. 23a). Of further significance to the Court was the failure of Congress in its 1986 amendment to the Act (*P.L.* 99-372) authorizing the award of attorney fees to successful litigants to provide any similar benefit to lay advocates. In the Court's view " . . . given Congressional recognition of lay advocate representation, 20 *U.S.C.* § 1415(d)(1), the failure to provide for lay advocate compensation in addition to the attorneys' fees provision strongly suggests an intentional omission" (App. 24a to 25a). Finally, in rejecting plaintiff's equal protection challenge to the no-compensation provision of *N.J. Ct. R.* 1:21-1(e) and *N.J.A.C.* 1:6A-4.2 and 1:1-5.4(b)(2)(vi), the Court noted among other things the distinction between attorneys and lay advocates, whose training in education would not qualify them to "hold themselves out as

'expert' " in the provision of legal services nor bind them to the same ethical and fiduciary restraints imposed upon the bar (App. 27a, 28a). In view of these distinctions the Court found the Supreme Court's prohibition of compensation for lay advocates "rationally related to the legitimate State interest in strictly regulating the practice of law by non-attorneys and maintaining the distinction between the licensed practice of law and the assistance of lay advocates" (App. 28a).

A Notice of Appeal was filed with the Clerk of the District Court on April 30, 1987 as to the compensation issue alone (Aa64). In its opinion and judgment dated March 16, 1988 the United States Court of Appeals for the Third Circuit affirmed the District Court's dismissal of the amended complaint (App. 1a to 15a). In rejecting the contention that the Supreme Court of New Jersey's no-fee rule "thwart[ed] the achievement of the goals Congress set" in the Education for All Handicapped Children Act by discouraging the use of lay advocate services in lieu of attorneys, the Court of Appeals noted that the "carefully drawn statutory language does not authorize these specially qualified individuals to render legal services":

> Although the Act does give '[a]ny party to any hearing' the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, *Id.* § 1415(d)(2), those functions are not designated to be performed by lay advocates. Furthermore, the statute does not use the word 'represent' in subsection (d)(1), as would be expected if Congress intended to place expert and legal counsel on the same footing. [App. 7a]

Based upon its review of the text of § 1415(d)(1), the legislative history of the Act as well as that accompanying the 1986 attorney fee amendment, the Court concluded that "substantial doubt" existed as to the claim that "Congress intended that no distinction be drawn between lawyers and lay advocates" (App. 8a). To the contrary, the Court of Appeals concluded that Congress' failure to include lay advocates within the attorney fees amendment was "unlikely . . . inadvertent" (App. 9a). In its view "[i]n the absence of explicit [statutory] provisions" mandating lay advocate compensation there was no basis upon which to find that Congress intended to supplant the historic role of the states in regulating the practice of law by prohibiting state regulation of lay advocates in state administrative proceedings (App. 9a to 10a). Based upon the reasoning of the District Court, the Court further rejected the equal protection challenge presented (App. 10a).

This petition for certification followed.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY CONSTRUED THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT AS NOT PROHIBITING STATES ACCEPTING FUNDING MADE AVAILABLE UNDER THE ACT FROM REGULATING THE MANNER AND CONDITIONS UNDER WHICH LAY ADVOCATES MAY ASSIST PARENTS OF HANDICAPPED CHILDREN AT STATE ADMINISTRATIVE HEARINGS CONDUCTED PURSUANT TO 20 *U.S.C.* § 1415.

In *Pennhurst State School and Hospital v. Halderman*, 451 *U.S.* 1, 17 (1981) this Court adjured the lower courts

that in reviewing statutory provisions of a federal grant-in-aid program they could recognize and enforce statutory rights as created under the federal statute only where there existed a corresponding obligation imposed by the statute upon the State in an "unambiguous" fashion. Where, however, Congress had failed to "express clearly its intent to impose conditions on the grant of federal funds so that the state c[ould] knowingly decide whether or not to accept these funds," 451 *U.S.* at 24, reviewing courts were not free to expand upon inchoate or precatory terms of the federal grant-in-aid statutes. Notwithstanding the clarity of the Court's opinion, petitioner herein asserts, in the absence of any express statutory directive or unambiguous legislative history, that Congress in enacting the Education for all Handicapped Children Act, 20 *U.S.C.* §§ 1400 *et seq.*, intended to condition a State's receipt of monies made available under the Act upon federal supercession of the traditional State prerogative of regulating the practice of law within State forums, in this instance by barring participating states from regulating the manner and terms under which non-attorneys may assist parents of handicapped children in State administrative hearings conducted pursuant to 20 *U.S.C.* § 1415(d)(1). Petitioner's contention, as the courts below properly concluded, finds no support in the language of the Act as initially enacted and as subsequently amended, its legislative history nor in any decision of this Court and thus warrants no further review by this Court.

Initially, it must be noted that nothing in the language of § 1415(d)(1), which accords to parents of handicapped children the right in state due process hearings

"to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children . . . " suggests, no less compels the conclusion, that Congress was according lay advocates any plenary right to act or be treated as lawyers in these State proceedings. The most that can be drawn from the statutory language is recognition of a party's right to appear and to be advised by special education experts at due process hearings. *See, Victoria L. by Carol A. v. District School Bd.*, 741 F.2d 369, 373 (11th Cir. 1984). On the significant issue of whether Congress intended to condition receipt of EACHA monies upon the State's recognition of these special education consultants as "legal experts" and thus entitled, as lawyers, to seek compensation for providing legal services, the statute is silent. As such, under *Pennhurst* the courts below properly refrained from finding supercession of State law to the contrary.

Further, as the Court of Appeals below recognized, Congress' enactment of the Handicapped Children's Protection Act of 1986, *P.L.* 99-372, dispels any question as to the earlier Congress' intent in adopting § 1415(d)(1). *See Bennett v. Ky. Dept. of Education*, 470 *U.S.* 656, 665 n. 3 (1985). Section 2 of that Act provides in pertinent part that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party." *See* 20 *U.S.C.* § 1415(e)(B). Nowhere however in the language of the amendatory Act, or in its legislative history, is there any discussion or provision for such fees to be afforded to lay advocates. *See 1986 U.S.*

Code Congressional & Administrative News, pp. 1798-1811. Certainly, if as petitioner contends, Congress intended there to be a presumption of equality between lawyers and lay advocates, authorization of a fee award would have been extended to lay advocates as well. The contrary result is of even greater significance given rulings by several federal courts that *P.L.* 99-372 empowers courts to award attorney's fees for administrative hearing activities. *See e.g., Eggers v. Bullitt County District*, 854 F.2d 892 (6th Cir. 1988); *Burr by Burr v. Ambach*, 683 *F. Supp.* 46 (S.D. N.Y. 1988); *Moore v. District of Columbia*, 666 *F. Supp.* 263 (D.D.C. 1987); *School Bd. of the County of Prince William v. Malone*, 662 *F. Supp.* 999 (E.D. Va. 1987); *Burpee v. Manchester School District*, 661 *F. Supp.* 731 (D.N.H. 1987); Senate Report of the Labor and Human Resources Committee of the United States Senate, S. Rep. No. 112, 99th Cong. 2d Sess. 2, reprinted in 1986 *U.S. Code Cong. & Adm. News*, 1798, 1800, 1804. *See also* 131 *Cong. Rec.* S10396, 10400 (July 30, 1985). *But see Rollison v. Biggs*, 660 *F. Supp.* 875 (D.Del. 1987). Insofar as the lay advocate's services are limited to the administrative hearing context, Congress' failure to afford parents a comparable right of compensation for those services lends substantial support to the view adopted by the courts below that disparity of treatment between attorneys and lay advocates is not inconsistent with congressional objectives in implementing the Act. Clearly, therfore, even assuming the correctness of petitioner's assertion that New Jersey's no fee rule will discourage lay advocates' participation in due process hearings, that result is no different than that

effected by Congress' decision to exclude lay advocates from the ambit of the attorney fee provision.*

Petitioner's further attempt to bolster her argument by reference to prevailing *federal* administrative practice is equally unpersuasive. The fact that many federal agencies pursuant to 5 *U.S.C.* § 555(b)** have opted to permit

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* There is no support for the petitioner's contention, however, that New Jersey Court Rule 1:21-1(e) will eliminate the availability of lay advocates. As the courts below recognized, the no-fee rule applies solely to compensation for *legal* services provided by the advocate; it in no way affects the ability of the non-attorney to seek and obtain compensation for services provided as an educational consultant or as an expert witness testifying on behalf of a party.

Nor is there any support for petitioner's claim that enforcement of the State rule presents parents with a two-fold choice: appear *pro se* or incur the expense of obtaining a lawyer. Certainly the record developed below points to the availability in New Jersey of free representation from at least one legal aid office as well as the Public Advocate's office (where no maximum income level requirement is imposed). Moreover with two hundred practitioners as of 1986 having handled one or more special education hearings at OAL, a large pool of legal talent can be tapped by parents in need of assistance. Given school districts' potential liability for attorneys' fees for administrative and court work, *see* discussion *supra*, these attorneys, as in the civil rights area, may have sufficient incentive to view these cases as worthy of pursuit irrespective of a client's ability to pay. Finally, even if a parent is unsuccessful in obtaining free or low cost legal services, numerous sources exist within the State to provide assistance to the parent appearing *pro se*. See p. 7 n. *supra*.

** 5 *U.S.C.* § 555(b) in pertinent part provides:

A person compelled to appear in person before an agency or representative therof is entitled to be accompanied,

(Continued on following page)

(with a variety of condition imposed) non-lawyer representation of parties appearing before these agencies and in many instances, the compensation thereof, provides little, if any, insight as what Congress' intent may have been with regard to 20 *U.S.C.* § 1415(d)(1)'s provision for state administrative special education hearings. Indeed, the absence of any express mandate requiring lay advocate representation in lieu of attorneys' or further direction as to lay advocate's entitlement to compensation speaks, if at all, to congressional intent to afford the states, as it did its executive agencies, the discretion to choose what conditions best serve the State's interests.*

(Continued from previous page)

represented, and advised by counsel or, *if permitted by the agency, by other qualified representative.* A party is entitled to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. . . . *This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.* [emphasis supplied]

* Manifestly, in the absence of any statutory directions or compelling legislative history evidencing Congressional intent to deprive the State of its traditional prerogatives in the regulation of the practice of law, it can be reasonably concluded that Congress might have anticipated the State's opting for the practice of an agency such as the Immigration and Naturalization Service, which prohibits compensation of lay representative. See 8 *C.F.R.* § 292.1(a)(2)(ii), (3)(ii). Congress as easily could have focused on executive agency policies in other grant-in-aid programs such as AFDC, Medicaid and Food Stamps where *no* directive as to compensation of lay representatives in fair hearings is set forth. *See e.g.,* 45 *C.F.R.* § 205.10(a)(3)(iii); 7 *C.F.R.* § 253.7(g)(3).

In view of the above, petitioner's attempt to cast this case into the *Sperry v. The State of Florida ex rel The Florida Bar*, 373 *U.S.* 379 (1963) mold is, as the Court of Appeals determined, to no avail. That Congress in its enactment of legislation affecting practioners in the federal Patent Office may have intended to preempt State unauthorized practice of law policies to the extent that they prevented those practitioners from engaging in activity incident to their federal practice simply provides no basis for finding a similar preemptive intent in a provision of a grant-in-aid statute addressing *State administrative* practice. Of further significance, as the Court of Appeals recognized, is the distinction in the statutory language at issue in *Sperry*. *See* 35 *U.S.C.* § 31. (the Commissioner of Patents "may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office.) See also 37 *C.F.R.* § 1.31 (" . . . an applicant for patent . . . *may* be represented by an attorney *or* agent authorized to practice before the Patent Office . . . ") (emphasis supplied).* Also telling is the *Sperry* Court's discussion of proposed regulatory amendments which were rejected in 1948 on the grounds that under those amendments "states [would] have the power to circumscribe and limit the rights of patent attorneys who are not lawyers," 373 *U.S.* at 386-387. In the final

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* In contrast, the regulations enacted by the federal Office of Special Education mirror the language of § 1415(d)(1) permitting a parent's right to be "accompanied and advised by counsel and by individuals with general knowledge or training with respect to the problems of handicapped children." *See* 34 *C.F.R.* § 300.508(a)(1).

analysis however the absence of any "unambiguous" statement of legislative intent precluding states from establishing conditions upon lay advocates' appearances at due process hearings, no less dictating that they be permitted to charge for their representation at such hearings, renders the *Sperry* analogy wholly inapposite.

In sum, no convincing evidence exists to support the contention that Congress has mandated that lay advocates be permitted to represent parents of handicapped children at State administrative hearings (in lieu of attorneys) and to charge for their representation, even if inconsistent with State policies regulating the practice of law. The lower courts' rejection of that position thus raises no substantial question warranting consideration by this Court.

Petitioner's equal protection claim fares no better. Implicitly, petitioner recognizes that if the Court of Appeals' statutory ruling below is upheld, New Jersey's dissimilar treatment of licensed attorneys and individuals not admitted to practice in the State is unassailable under the applicable rational relationship test. See *Leis v. Flynt*, 439 *U.S.* 438 (1979); *Martin v. Davis*, 187 *Kan.* 473, 357 *P.*2d 782, (1960), app. dis. for want of a substantial federal question, *sub* nom. *Martin v. Walton*, 368 *U.S.* 25 (1961); *Ginsburg v. Kovrak*, 139 *A.*2d 889 app. dis. for want of a substantial federal question, 358 *U.S.* 52 (1958). As the courts below concluded, since New Jersey could ban the practice of law altogether by unlicensed individuals, the more limited restrictions imposed by *N.J. Ct. R.* 1:21-1(e) are equally permissible. *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 *U.S.* 328 (1986) (having chosen to legalize casino gambling Puerto Rico is not

barred by the First Amendment form taking less intrusive steps of reducing resident demand through restrictions in advertising).

However, even if the Court of Appeals' ruling as to the scope of 20 *U.S.C.* § 1415(d)(1) were in error insofar as it would permit states to limit lay advocates' activities to consulting and appearing as expert witnesses in the State due process hearings, the no-fee rule would still survive scrutiny.

As the courts below recognized the Supreme Court of New Jersey reasonably could have concluded that to permit non-attorneys with expertise in a subject area, to obtain direct or indirect compensation for their activities at OAL would encourage establishment of a "cottage industry" of lay advocates and/or foster an impression in the public or in that individual that his/her participation in the legal process in some fashion altered his status into one equal to that of an attorney. By prohibiting payment for the services provided by the lay advocate – an individual not qualified by legal education or licensure to provide legal services, and not subject to the strongest ethical and fiduciary constraints imposed upon the bar – the Supreme Court reasonably and permissibly drew distinctions between this group and licensed attorneys. *Turner v. American Bar Assoc.*, 407 *F. Supp.* 451 (N.D. Tex., W.D. Pa., N.D. Ind., D. Minn., S.D. Ala., W.D. Wis. 1975), aff'd *sub nom. Taylor v. Montgomery*, 539 *F.*2d 715 (7th Cir. 1976), and *Pilla v. American Bar Assoc.*, 542 *F.*2d 56 (8th Cir. 1976). In so doing New Jersey clearly has not treated similarly situated persons in a dissimilar fashion. Petitioner's suggestion that consumer confusion could be avoided by simply forbidding lay advocates from calling

themselves anything that suggests that they are lawyers clearly fails to address the Supreme Court of New Jersey's concern that permitting compensation for representation services might legitimize both in the advocate's and the public's mind an erroneous assumption – namely, that the advocate has expertise and training in the legal profession. Moreover, it certainly would do little to allay such fears in the case of petitioner who throughout the course of the District Court proceedings professed her expertise in special education law and her belief that the quality of the representation she provided was equal to that of an attorney.

However, all of this ultimately is beside the point. That the Supreme Court of New Jersey might have chosen a different approach to the problem does not establish the absence of any rationality in the restrictions adopted. The prohibition against compensation is based upon sound policy judgments within the competency of the Supreme Court of New Jersey and advances those policies in a reasonable fashion. Petitioner remains free under the Third Circuit ruling to earn a livelihood as an expert witness or consultant at OAL hearings. In thus delimiting her role as an advocate the State advances the public interest consistent with its traditional role of regulation of the practice of law within its jurisdiction. Petitioner's equal protection challenge to *N.J.Ct.R.* 1:21-1(e) thus provides no further basis for this Court's review.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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By: Andrea M. Silkowitz
Assistant Attorney General

DATED: October 13, 1988